

No. 94232-3

WASHINGTON STATE SUPREME COURT

University of Washington,)	
)	
Respondent,)	CITY'S REPLY REGARDING
)	ITS MOTION TO TAKE
v.)	ADDITIONAL EVIDENCE OR
)	STRIKE TWO OF THE
)	UNIVERSITY'S NEW CLAIMS
City of Seattle, et al.,)	
)	
Appellants.)	

I. ARGUMENT

The City of Seattle ("City") asks the Court to take additional evidence to address two factual claims the University of Washington ("UW") made against the validity of City Ordinance 117430: (1) the City did not comply with the Growth Management Act's ("GMA") public participation requirements when adopting the ordinance; and (2) UW had no way to know the ordinance would have the effect of "adopting" the Landmarks Preservation Ordinance ("LPO") pursuant to the GMA.¹

¹ City Motion at 3. *See* UW Response at 32-34. *See, e.g., id.* at 33 ("The City should not be heard to claim it provided the required vigorous public process when it did not provide the public with any notice of what the City now claims the process was about.") and 34 ("The public had no way

UW does not dispute it failed to raise these factual claims in the trial court or offer evidence of the public engagement process supporting the ordinance's enactment. UW instead opposes the City's motion through four ungrounded contentions.

First, UW makes irrelevant observations about how the additional evidence addresses other claims of whether the ordinance: accomplished the subject of its title; followed the City's comprehensive plan; or complied with the City Charter.² The City does not offer the additional evidence to address those claims.

Second, UW mistakenly assumes a party may offer new, unsupported factual claims on appeal if they respond to the other side's argument. UW explains it made the new factual claims not as part of its affirmative case, but to disprove the City's case.³ That distinction makes no difference. The rules limiting claims to the record apply to all parties throughout the appeal.⁴

to determine that [the ordinance] was attempting to bless the LPO, as opposed to the zoning code, as a GMA development regulation . . .”).

² UW's Opposition at 8.

³ “The University argues . . . the City's *interpretation* also must be rejected because this interpretation would mean the Ordinance . . . would have violated . . . the provisions of the GMA that require enhanced public participation.” UW's Opposition at 8-9.

⁴ RAP 2.5(a); RAP 9.12.

Third, UW makes an unsupported assertion that “no equities weigh in the City’s favor with regard to evidence that is or is not in the record.”⁵ The equities favor the City. The City had no cause to present this evidence in the trial court—UW waited until its appellate response to claim the City violated the GMA’s public participation requirements and left UW “no way” to know the ordinance would have the effect of adopting the LPO pursuant to the GMA. Especially given this Court’s focus on the aspect of the case involving those claims,⁶ it would be inequitable to force the City to rebut them without evidence. UW alleges no hardship and does not dispute the evidence’s authenticity or context. UW cannot claim surprise over the evidence because one of UW’s counsel was an attorney in the Seattle City Attorney’s Office and acknowledged as a member of the ordinance’s “Implementation Team” in 1994.⁷

Finally, UW misreads the GMA. UW complains the additional evidence addresses only Section 040 of the GMA, not Section 103, which UW asserts “requires local government actually to ‘adopt’ local development regulations

⁵ UW’s Opposition at 10.

⁶ *See* Court’s letter requesting supplemental briefing (April 20, 2017).

⁷ CP 588 (Declaration of Patrick J. Schneider in Support of University of Washington’s Reply Briefs: “In 1994, when the City Council enacted Ordinance No, 117430, I was an attorney in the Seattle City Attorney’s Office, and I have personal knowledge of the fact that at that time the Landmarks Preservation Ordinance was codified in Title 25 of the Seattle Municipal Code, as it is today, not in Title 23.”); AE 16 (acknowledging Mr. Schneider as a member of the “Implementation Team”).

‘pursuant to’ the GMA before they can apply those development regulations to state agencies”⁸ UW is mistaken. The only requirement for cities to “adopt” development regulations under the GMA was in Section 040:

[Local jurisdictions] *shall take actions under this chapter as follows*: . . . (d) . . . each city located within the county *shall adopt* . . . development regulations that are consistent with and implement the comprehensive plan on or before [a 1994 deadline].⁹

Section 103 requires nothing of cities. It imposes a requirement only on state agencies: to comply with development regulations adopted pursuant to the GMA.¹⁰ The additional evidence addresses the public process the City used to adopt development regulations pursuant to the relevant GMA provision:

Section 040.

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⁸ UW’s Opposition at 11.

⁹ RCW 36.70A.040(3) (emphasis added). The initial deadline for cities in more populous counties was July 1, 1994, but the GMA allowed local jurisdictions to seek a six-month extension. *Id.*

¹⁰ RCW 36.70A.103 (“State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter . . .”).

II. CONCLUSION

UW asserted new factual claims in the appellate court without support in the record. To redress that rule violation, the City respectfully asks the Court to take the evidence the City offers to rebut those claims, or strike the claims.

Respectfully submitted May 17, 2017.

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By: _____ /s/_____

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of the **City's Reply Regarding its Motion to Take Additional Evidence or Strike Two of UW's New Claims** via e-mail by agreement under CR 5(b)(7) to the following parties:

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DATED May 17, 2017, at Seattle, Washington.

/s/

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